Supreme Court, U. S.
FILED
APR 23 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-898

LINDA MARIE SUTHERLAND; ROXANA MARGURITE SCHULTZ;
and TONIA SUE PAPKE,

Appellants,

—against—

PEOPLE OF THE STATE OF ILLINOIS,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS

APPELLANTS' BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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Pursuant to Rule 16(4) of the Court's Rules, Appellants submit this brief in opposition to the Motion to Dismiss or Affirm filed by the State of Illinois.

The ultimate issue in this case is whether, in light of the factual context, the Illinois statute and the judicial gloss on that statute, the Appellants' conviction for burning an American flag, as

an integral part of a respectful and prayerful ceremony expressing their views on critical national issues, is consistent with constitutional principles. The State contends that these issues have been conclusively resolved against the Appellants by this Court's decisions. We respectfully submit that they have not, and that the issues tendered here are sufficiently substantial to warrant plenary consideration.

1. The decision in Smith v. Goguen demonstrates that the questions raised here are substantial.

Notwithstanding Appellee's claim that Smith v. Goguen, 415 U.S. 566 (1974) is distinguishable from this case, the rationale of that decision is clearly applicable to the Illinois flag desecration statute under which the Appellants were convicted. There, this Court held that a flag desecration statute, using the term "treats contemptuously," was unconstitutionally vague. Here, the Appellants were convicted of violating a statute substantially similar to the one held void in Goguen. And, like the Massachusetts statute, the Illinois law lacks "substantial specificity" as to "what constitutes forbidden treatment of United States flags." 415 U.S. 566 at 581-582.

Appellants were prosecuted under the second paragraph of Ill.Rev.State. 1969, ch. 56-1/4, sec. 6, which states:

> Any person who publicly mutilates, defaces, defiles or defies, tramples or casts contempt upon, whether by words or act, any such flag, standard, color or ensign shall be punished by a fine of not less than $1,000.00 nor more than $5,000.00 or by imprisonment in the penitiary from one to five years or both. (Emphasis supplied.)

Although the Appellants here were charged with "publicly mutilating a flag," not casting contempt on it, both the language of the statute and its Illinois judicial construction and application, see Smith v. Goguen, supra, 415 U.S. at 582, n. 31, make clear that it is not all acts of physical mutiliation that are outlawed, but only those that are performed with an attitude toward the flag communicated to others that is perceived as "contemptuous." The perception, of course, is that of the police, prosecuting officials, and/or ultimately the triers of fact. That the statute is concerned with communication is apparent from the requirement that the act of flag desecration must be performed"publicly" and the decisions of the Illinois Supreme Court holding that the purpose of the statute is to prevent breaches of the peace. People v. Lindsay, 51 Ill.2d 399, 282 N.E. 2d 431, 435 (1972); People v. Von Rosen, 13 Ill.2d 68, 71, 147 N.E.2d 327 (1958). Breaches of the peace can only occur if those reacting to the use of the flag first perceive a message of some type that arouses them to action. As stated by this Court, "Symbolism is a primitive but effective way of communicating" and "is a short cut from mind to mind." West Virginia State Bd. of Education v. Barnette, 319 U.S. 624, 632 (1943); Spence v. Washington, 418 U.S. 405, 410 (1974).

That the thought content communicated must be perceived as "contemptuous" is clear from the words, "defiles," "defies," and "casts contempt upon," as well as the title of the act, "Desecration...." The only words that could arguably be considered as not requiring any particular thought are "mutilates," defaces," and "tramples." But these words, when read in context and in light of the Illinois cases, are not subject to the neutral

interpretation that Appellee urges.

The very facts of this case demonstrate the content of expression that the statute is intended to reach. The person who observed the burning from his automobile testified that he "trampled" on the flag in order to put out the fire. Under such circumstances, the "trampling" was done knowingly and intentionally, and, thus, literally violated the "tramples" portion of the statute. However, the passerby was not charged with a violation, presumably because the officials perceived his state of mind at the time of the trampling to be one of respect or concern for the flag. Yet, it is that discretion to pick and choose, depending on the official's perception of the actor's state of mind, which Smith v. Goguen condemns.

Similarly, Congress has enacted a Flag Etiquette statute which provides in part:

> The flag, when it is in such condition that it is no longer a fitting emblem for display, should be destroyed in a dignified way, preferably by burning. 36 U.S.C., Sec. 176(j).

While the public flag burner complying with the foregoing statute literally violates the Illinois law, since he "mutilates" the flag, his state of mind would presumably be perceived by prosecuting authorities as respectful of the flag, even though those precise physical actions with respect to the flag would be identical to those of the Appellants. Indeed, the Illinois Appellate Court specifically disavowed the applicability of the Federal Flag Etiquette statute to the facts here, stating, "that the defendants' purpose was to protest against current events, not to dispose of a flag in poor

condition." (J.S. App. 7a.) Under this Illinois ruling, a person who burns a flag while communicating the attitudes contemplated by the Federal Etiquette statute does not violate the Illinois statute.

Equally important, the Illinois breach of the peace judicial gloss necessarily requires that the content of the ideas communicated be of a nature that will stir angry passions. Such passions will only be aroused, if at all, by the communication of what is perceived as negative or derogatory ideas about the flag.

But it is precisely because the perceptions and "personal predilections" of one person as to what constitutes contempt may differ from that of others that the Massachusetts statute was found unconstitutional in Smith v. Goguen. The same difficulties are present here. Appellant Papke testified, in an offer of proof, that the purpose of the prayers said before burning the flag was to express the view that the country had "strayed from" the "beautiful symbol" which the flag was and the ideas which it represented (J.S. at 405.) Those people sharing Papke's point of view could certainly have concluded that no "contempt had been cast upon the flag, but that on the contrary it was being honored, much as the Flag Etiquette statute prescribes a dignified ceremonial burning of a flag "in such condition that it is no longer a fitting emblem for display...." Yet, under the Illinois courts' analysis, burning the flag "to protest against current events" was somehow different.

Under that interpretation, a group of girl scouts that had publicly performed the same ceremony of burning an "oily and greasy and dirty" flag which

"had holes in it" and "was no longer a fitting display of our country," - language which Appellant Papke used to describe the flag that was burned - would not have been prosecuted at all, just as the passing motorist was not prosecuted for having "trampled" the flag. He might very well have been prosecuted, however, had he displayed a peace sign on his automobile, or otherwise manifested opposition to the draft and the war; or had he further stated that his purpose in trampling out the fire was to preserve the mutilated flag as a symbol of the moral and spritual mutilation of the country. A statute which admits of such different application is unconstitutionally vague. See Smith v. Goguen, supra, 415 U.S. at 575-576 (concerning differential treatment for identical conduct of American Legion members and war protestors).

The fact is that when political thought is communicated symbolically, what constitutes desecration rather than reverence is very much in the eyes of the beholder. As this Court first observed over thirty years ago, "A person gets from a symbol the meaning he puts into it, and what is one man's comfort and inspiration is another's jest and scorn." West Virginia State Board of Education v. Barnette, supra, 319 U.S. 624 at 632-633; Spence v. Washington, 418 U.S. 405, 413 (1974).

Juries and judges should not be allowed to determine whether the thought content behind an act toward an inanimate object is "respectful" or "contemptuous," and to pronounce guilt or innocence accordingly. When a statute is so vague that there are no "ascertainable standards

of guilt" apart from the viewpoint of the trier of fact, the statute is void, and its enforcement violates due process of law. Papachristou v. City of Jacksonville, 405 U.S. 156 (1972); Smith v. Goguen, supra.

Assuming arguendo, that it is clear the mutilation in the subject case was contemptuous, the conviction, nonetheless, must be reversed under Mr. Justice White's analysis in Smith v. Goguen. As the foregoing discussion demonstrates, the Illinois prohibition is not against all flag mutilation, but only that which is perceived as "contemptuous." Yet, as Justice White stated in his concurring opinion:

> To convict on this basis is to convict not to protect the physical integrity or to protect against acts interfering with the proper use of the flag, but to punish for communicating ideas about the flag unacceptable to the controlling majority in the legislature. 415 U.S. 566 at 588.

Thus, under either of the analyses in Goguen, the convictions here must be reversed.

2. This Court's earlier remand for reconsideration in light of Smith v. Goguen and Spence v. Washington did not, sub silentio, resolve all other issues in the case.

The Appellee seems to suggest that because this Court remanded the Appellants' earlier appeal, rather than reversing the conviction outright, this Court impliedly affirmed the earlier state court rulings except insofar as Smith and Spence might require a contrary result.

Such a suggestion ignores this Court's normal practice of remanding cases for reconsideration in light of intervening decisions, rather than initially determining whether those intervening rulings, or any other issues, require final disposition on the merits. See, e.g., Lewis v. City of New Orleans, 415 U.S. 130 (1974). Following such a remand and a second appeal to this Court, all of the issues encompassed within the case, and not just those identified in the remand, are properly before the Court. See, e.g., Bigelow v. Virginia, ____ U.S. ____, 44 L.Ed.2d 600 (1975).

CONCLUSION

For the reasons set forth above, jurisdiction should be noted.

Respectfully submitted,

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April, 1976